NO. 83728-7

SUPREME COURT
OF THE STATE OF WASHINGTON

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KATHLEEN HARDEE,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
DEPARTMENT OF EARLY LEARNING,

Respondent.

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# SUPPLEMENTAL BRIEF OF PETITIONER

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## A. INTRODUCTION

Once again, a Washington citizen must come before this Court to fight for her constitutional right to due process in defending her state-issued professional license.

Kathleen Hardee, a 23-year child care provider, had her license to do business stripped based on a preponderance of evidence. The Court of Appeals upheld the administrative rule that invoked this inadequate standard, despite this Court's repeated pronouncements that only a clear, cogent, and convincing standard satisfies due process.

Despite applying only a preponderance standard of proof to the evidence in this case, the ALJ who served as factfinder concluded that there was no evidence to support a license revocation. However, the DSHS review judge discarded the ALJ's implicit and explicit credibility findings, and applied the wrong legal standard, to conclude that the ALJ was wrong.

Hardee prevailed before the finder of fact applying only a preponderance standard of proof. The review judge's reversal violated the APA and the applicable administrative rules. Hardee is entitled to have the ALJ's decision reinstated.

## B. ISSUES PRESENTED FOR REVIEW

1. Do the due process clauses of the Washington and federal constitutions require that a childcare provider's state-issued license be revoked only upon the presentation of clear, cogent, and convincing evidence justifying revocation?

2. In an administrative appeal may a review judge reverse an ALJ's findings of fact and credibility determinations and substitute a new view of the evidence based solely on hearsay rejected by the ALJ?

3. Did the review judge apply the wrong legal standard to Hardee's behavior in finding that she left children "unsupervised?"

C. STATEMENT OF THE CASE

Most of the pertinent facts are recited in the Court of Appeals' ruling. However, the critical findings of the Administrative Law Judge (ALJ) are not included, and are recited here. At the administrative hearing, ALJ Rynold Fleck heard nine witnesses and viewed 23 exhibits. CP 314-33. One Department of Early Learning (DEL) witness testified that he had once come in and seen William changing his daughter's diaper in the changing room while Hardee was in the living room with other children. CP 685. Hardee testified that she had been changing the diaper, but had stepped forward to see who had come in, and that she is always within sight and hearing. CP 627-30. It is critical to note that this incident

occurred before there was any allegation or indication of sexual misconduct by William.

Reviewing the case under a preponderance of evidence standard, ALJ Fleck found insufficient evidence to support the DEL revocation and rescinded it. CP 332. Among his findings were that there was no indication that William was a danger to young children prior to July 2006; he found insufficient evidence that William had been left unsupervised, and no evidence that any unauthorized persons were living in the home. CP 331-32. He described the evidence presented as "circumstantial." *Id.* DEL presented no evidence that Ms. Hardee did not understand or respect children, and ALJ Fleck found no evidence of any such qualities lacking. *Id.* Regarding the specific incident with the diaper change, that both Hardee's and the parent's version of events proved that Hardee was never out of hearing of the child, which is what the applicable regulations required.

License revocations are public on the Child Care Check; posted on the DEL website. The primary web address for DEL is www.DEL.wa.gov. Revocations are recorded and reported as a "negative action"[1] and are reported on all background checks to prevent Ms. Hardee

[1] "Negative action" means a court order, court judgment or an adverse action taken by an agency, in any state, federal, tribal or foreign jurisdiction, which must be reported and checked on any background check. *See* WAC 170-06-0010(9).

from future employment in a number of professions. The revocation of this license is a "negative action" which is reported on the DEL Director's List of Crimes and Negative Actions. *Id.*

D. SUMMARY OF ARGUMENT

In the ten years since this Court's landmark decision in *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n,* 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied,* 535 U.S. 904 (2002), the Courts of Appeal have been struggling to define the scope of that ruling. *Nguyen* established that a professional such as a doctor or dentist has the benefit of a higher standard of proof in disciplinary proceedings, but the lower courts have been perplexed about whether that same standard should apply to other state-issued licenses.

Discriminating against certain professions by making relative value judgments about the worth of the profession to society is an improper approach to this constitutional issue. All state-issued professional licenses, including those issued to child care workers, are a protected property interest that may only be revoked on the basis of clear, cogent, and convincing evidence.

The APA requires review judges, who have an appellate rather than a factfinding role, to give "due regard" to the finder of fact's credibility determinations. A review judge may not reverse such

determinations based solely on hearsay evidence, nor may a review judge apply a standard of conduct to a child care worker that contradicts the standard expressed in the administrative regulation.

Under any standard of proof, the superior court erred in upholding the review judge and reversing the ALJ's determination. The superior court judgment should be reversed, the ALJ's ruling should be reinstated, and Hardee should be awarded her attorney fees under the Equal Access to Justice Act.

E. ARGUMENT

(1) Standard of Review and Applicable Law

This Court reviews constitutional questions *de novo*. *Berrocal v. Fernandez,* 155 Wn.2d 585, 590, 121 P.3d 82 (2005). This Court stands in the same position as a superior court in reviewing administrative rulings. *Farm Supply Distrib., Inc. v. Wash. Util. & Transp. Comm'n,* 83 Wn.2d 446, 448, 518 P.2d 1237 (1974). This Court reviews de novo an agency's interpretation of agency regulations, reviewing the regulations as statutes. *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.,* 122 Wn. App. 402, 409, 97 P.3d 17 (2004), *aff'd,* 157 Wn.2d 90, 135 P.3d 913 (2006). An agency's interpretation is reviewed under an error of law standard, which allows this court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *Id.* This Court is not

bound by an agency's interpretation of law. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007). In the context of a de novo review of an administrative decision, this Court determines whether the facts found by the agency are supported by substantial evidence and then independently determines the law and applies it to those facts. *Franklin County Sheriff's Office v. Sellers,* 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982); *Pechman v. Employment Security Division,* 77 Wn. App. 725, 729, 893 P.2d 677, *review denied,* 128 Wn.2d 1003 (1995).

The State must provide due process when it deprives an individual of "life, liberty, or property." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. This Court's decision in *Nguyen* established that a state-issued professional license is a protected property interests that may only be revoked if the state provides clear, cogent, and convincing evidence. 144 Wn.2d at 523.

The revocation of a state-issued professional license is a quasi-criminal finding, the negative action attached to the provider is a loss of liberty, a loss of profession, reputation, employment. A this court made clear in *Nguyen*, such proceedings demand a higher standard of proof than that applied to civil actions where only pecuniary interests are at stake:

> Because of their unique nature, constitutional due process requires quasi-criminal proceedings--instigated by the state and involving a

> stigma more substantial than mere loss of money--be proved by the clear preponderance of evidence. It would be incongruous and contrary to both Washington and federal precedent to allow a quasi-criminal prosecution to proceed under the lowest standard of proof available."

*Nguyen,* 144 Wn.2d at 523.

Therefore, this Court has established that a person's ability to practice a chosen profession hinges upon the State's approval or denial of a license, deprivation of that license takes on constitutional magnitude and the clear, cogent and convincing standard applies.

(2) The Clear, Cogent, and Convincing Standard of Proof Should Apply to Proceedings to Revoke Child Care Licenses

(a) This Court's *Ongom* Decision Rejected the Notion that Value Judgments About Professions Affect the Standard of Proof

In the almost ten years since this Court made its landmark ruling in *Nguyen,* the Courts of Appeal have been attempting to restrict its application to only those professions they deemed worthy. This trend began almost immediately with *Eidson v. State, Dep't of Licensing,* 108 Wn. App. 712, 32 P.3d 1039 (2001). In that case, Division I of the Court of Appeals ruled that a real estate appraiser's license could be revoked based on a preponderance of evidence. *Id.* at 718. The *Eidson* court conceded that doctors and real estate appraisers were both "regulated professions," but argued that each profession must be individually

examined based on "the interests of both the license holder and the public...." *Id.* The Court cited authority from other states suggesting that, for example, doctors merited a lower standard of proof because they were a greater threat to public safety than attorneys. *Id.* at 719. Then, inexplicably, the *Eidson* court concluded that the real estate appraisers merited a lower standard of proof because "[i]ncompetent performance by an appraiser does not ... have life-threatening consequences." *Id.* Apparently, the *Eidson* appellant did not petition this Court for review of that decision.

Shortly after *Eidson* issued, Division II of the Court of Appeals disagreed with it in *Nims v. Washington Bd. of Registration,* 113 Wn. App. 499, 53 P.3d 52 (2002). The *Nims* court pointed out the illogic of first arguing that the disciplinary standard of proof should be lower if the regulated profession poses a greater threat to the public, and then applying a lower standard of proof to a real estate appraiser than is applied to a doctor. 113 Wn. App. at 504-05. The *Nims* court also rejected *Eidson*'s subjective judgment about the value of one license over another as it relates to the standard of proof:

> Nor can we agree with the *Eidson* court's view that the time and money spent on training justifies different burdens of persuasion for different professions. In our view, the time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion.

*Id.* at 505.

In 2005, Division I the Court of Appeals continued its trend of weighing the value of various professional licenses with its opinion in *Ongom v. State, Dep't of Health Med. Quality Assurance Comm'n,* 124 Wn. App. 935, 104 P.3d 29 (2005). The Court of Appeals attempted to distinguish *Nguyen* based on the fact that a nursing assistant's license – unlike a physician's license – requires no education or training:

> A physician completes many years of rigorous education, training, and examination at enormous expense, and generally expects the practice of medicine to be a permanent career. *Registered nursing assistants, by contrast, have no educational or training requirements at all*, perform duties only as delegated and supervised by nurses, and are employed in a field plagued by chronic and frequent turnover. The legislature provided for a "voluntary certification of those who wish to seek higher levels of qualification" which requires some training and competency evaluation, but even so, the value of the license to the holder is markedly different for nursing assistants than for physicians. ...

*Ongom,* 124 Wn. App. at 944 (emphasis added). The Court of Appeals also tried to justify using a lower standard of proof arguing, "By statute, any person can obtain a nursing assistant license by simply submitting an application and paying a nominal fee. In fact, an applicant need not even obtain the license before beginning work as a nursing assistant." *Id.*[2]

[2] Since *Nguyen,* the Court of Appeals used similar reasoning to either reject or apply the clear, cogent, and convincing standard in a number of other professional

In 2005, this Court accepted review of *Ongom* and attempted to end the trend of reserving the clear, cogent and convincing standard only for highly paid and highly educated professionals. This Court reversed the Court of Appeals in *Ongom v. State, Dep't of Health Med. Quality Assurance Comm'n,* 159 Wn.2d 132, 104 P.3d 1029 (2006), *cert. denied,* 127 S. Ct. 2115 (2007). This Court explicitly rejected the notion that the amount of education and training involved in acquiring a license should be determinative of the level of proof required to revoke it.

In reversing the Court of Appeals in *Ongom*, this Court made clear that considerations of time and investment in obtaining the license were improper when contemplating the value of a particular license to the holder:

> The time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion. We reject the Court of Appeals conclusion that "the property interest in a nursing assistant's license, while not insignificant, is considerably more limited than the property interest in a license to practice medicine." *The licenses may be different, but nurses and medical doctors have an identical property interest in licenses that authorize them to practice their respective professions.*

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credentialing contexts. *See, e.g., Eidson v. Dep't of Licensing,* 108 Wn. App. 712, 32 P.3d 1039 (2001) (preponderance standard applied to real estate appraisers); *Nims v. Washington Bd. of Registration,* 113 Wn. App. 499, 53 P.3d 52 (2002) (clear, cogent and convincing applies to registered professional engineers).

*Ongom,* 159 Wn.2d at 138-39 (emphasis added). "To the contrary," this Court observed, "loss of reputation to one marginally qualified for a modest occupation is potentially *more damaging* than the loss of reputation for a highly qualified medical specialist ... who may have many more alternate career opportunities." *Id.* at 139 (emphasis added).

Despite this Court's clear rejection in *Ongom* of a values-based system of weighing professional licenses, the Courts of Appeal have continued their pattern of picking and choosing which state-issued licenses are valuable enough, and involve sufficient training and education, to merit the higher standard of proof. First, Division II of the Court of Appeals denied the higher standard to the revocation of exotic dance licenses. *Brunson v. Pierce County,* 149 Wn. App. 855, 205 P.3d 963 (2009). In part, the *Brunson* court argued that exotic dancing was not one of the "business professions" listed in RCW 18.118.120. It is notable, however, that nursing assistants – protected by the *Ongom* ruling – also are not listed in that statute.

(b) Child Care Is a More Regulated Profession Than Nursing, the Profession at Issue in *Ongom*

There are three levels of state professional credentialing available: (a) registration, (b) certification, and (c) licensure. RCW 18.22.030. *Ongom* and *Nguyen* involved professionals from the lowest level (registration) to the highest level (licensure) respectively. This case

represents the mid-level credentialing, certification. WAC 170-296-1410. Obtaining a child care license involves more stringent requirements than obtaining a nursing assistant's registration. Op. at 7; WAC 170-296-1410. A child care license is mandatory, while the license at issue in *Ongom* was voluntary. *Id.* A child care license requires 20 hours of training; a nursing assistant's license requires no training. *Id.* A child care license applicant must pass a background check, a nursing assistant need not do so. *Id.*

Despite the holding in *Ongom* that even a profession certified at the registration level merits the clear, cogent and convincing standard, the Court of Appeals has concluded in this case that *Ongom* holding is inapplicable to child care givers because a child care license is more like an occupational license, such as that issued to erotic dancers. Op. at 8. The Court of Appeals also held that only those licenses which include "(a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination" merited the higher standard of proof. *Id.* at 8 n.18. This is *directly contrary* to *Ongom*, in which this Court held that a nursing assistant license – which requires no education or examination – merited the higher standard of proof. *Ongom,* 159 Wn.2d at 138-39.

The Court of Appeals here has misread *Ongom* and allowed a due process violation to stand. Just as it did in *Ongom* before this Court

intervened, the Court of Appeals has downplayed, and even denigrated, the nature of a child care license in an attempt to justify a lower standard of proof.

The constitutional concerns at issue in *Nguyen* and *Ongom* apply equally to child care licensees. Due process protections in a state-issued license do not diminish based on society's subjective evaluation of the worth of individual professions. *Ongom,* 159 Wn.2d at 138-39.

Hardee was a licensed child care provider for 23 years. It was her chosen and only profession. She practiced that profession by the grace of the State of Washington, and the State may revoke Hardee's livelihood only after providing full due process rights guaranteed by the Constitution.

In order to satisfy due process, before DEL may revoke a child care license it must prove the necessity of doing so by clear, cogent, and convincing evidence.

(3) Even Viewing the Evidence Under a Preponderance Standard, Hardee Did Not Merit Revocation

Even applying the inadequate "preponderance of evidence standard," the ALJ concluded that there was "no evidence" to support DEL's license revocation, and reversed it. The review judge reversed the ALJ, citing hearsay testimony as the basis for doing so. The superior court erroneously upheld the review judge's findings.

(a) The Review Judge Acted Outside the Scope of Her Authority and Misapplied the Law When She Reversed the ALJ's Findings

Under RCW 34.05.464(4) a review judge acts outside the scope of her authority when she bases contradictory findings solely on hearsay evidence the ALJ rejected as lacking credibility. *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 445, 192 P.3d 903 (2008) citing *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 559 (2007), *reversed on other grounds*, 164 Wn.2d 925, 194 P.3d 988 (2008).[3] The fact-finder may only base a finding exclusively on hearsay evidence if he or she determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. RCW 34.05.461(4).

In *Costanich,* the Court of Appeals reviewed the revocation of a foster care license. 138 Wn. App. at 551. Costanich was a licensed foster parent in Washington for over 20 years. *Id.* at 552-53. Before the abuse allegations, the most recent state evaluation described the Costanich foster home as a "unique and valuable resource ... unsurpassed by any foster home in the State." *Id.* During the summer of 2001, DSHS investigated an allegation that Costanich emotionally and physically abused her foster

[3] Compare *Regan v. State Dep't of Licensing*, 130 Wn. App. 39, 121 P.3d 731 (2005), *review denied*, 157 Wn.2d 1013 (2006) ("due regard" does not mean review judge is absolutely bound by ALJ credibility determinations, if there is direct evidence to support their reversal).

children. DSHS reported there was inconclusive evidence of physical abuse, but the emotional abuse allegations were "founded." This finding was based primarily on two specific incidents. *Id.* K claimed that Costanich said "I'll kill you bastard" to F, when she had to pull him off one of her female aides. The aide and F had gotten into an altercation because F was spying on her while she was sunbathing. K also said Costanich told P, the only African-American child in the house, to move his "black ass." Additionally, he alleged Costanich had a general habit of swearing at the children and had called E a "cunt." Later investigation resulted in allegations that Costanich also called E a "bitch."

The ALJ in *Costanich*, after reviewing the evidence and hearing live witness testimony, initially concluded that Constanich's behavior did not constitute emotional abuse and did not justify revocation of her license. *Id.* But the DSHS review judge substituted his own view of the evidence for that of the ALJ, based primarily on the hearsay testimony and reports of the Child Protective Services (CPS) investigator, and upheld the DSHS abuse finding and revocation. *Id.*

The Court of Appeals reversed, holding that the DSHS review judge had improperly ignored the considered findings of the independent ALJ. *Id.* at 564. Among the improprieties the Court of Appeals noted:

- The review judge reversed mostly based on the hearsay evidence of the investigators, contradicting the ALJ's findings based on direct evidence;
- The review judge claimed the ALJ "failed to make factual findings" when the ALJ in fact made findings;
- The review judge "substituted" her "view of the evidence" for the ALJ's, when the ALJ's were supported by substantial evidence;
- The review judge added findings, despite the fact that they were directly contradictory to the ALJ's findings.

*Id.* at 556-60.

This case is factually indistinguishable from *Costanich.* The ALJ found no evidence to support Hardee's license revocation. However, based almost exclusively on DEL's hearsay evidence, the review judge found Hardee incapable and unqualified to care for children, and to have exposed them to unsupervised access to someone who later abused a child.

The DEL review judge ignored the ALJ's findings entered additional findings based upon hearsay that she claimed supported revocation. CP 249-82. She also ignored the ALJ's implicit findings that the investigators' hearsay testimony and opinions regarding Hardee's fitness were not credible. CP 250, 256-57.

The Court of Appeals suggested that because the ALJ did not explicitly state that the investigator's hearsay evidence was not credible, the review judge was entitled to re-make those determinations without giving "due regard." *Hardee*, 152 Wn. App. at 60.

However, Washington courts have recognized that findings in one's favor are implicit credibility findings. *Trotzer v. Vig,* 149 Wn. App. 594, 203 P.3d 1056, *review denied,* 149 Wn. App. 594 (2009) (finder of fact implicitly found one party more credible by ruling in his favor); (*In re Marriage of Lutz*, 74 Wn. App. 356, 371, 873 P.2d 566 (1994) (the finding that a mother had "proceeded in good faith in securing care and treatment ...." was an implicit credibility determination). A finder of fact need not spell out every determination it is required to make in order for that determination to be implicit in the ruling. *Spreen v. Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

It is disingenuous to suggest that a review need only give "due regard" to the ALJ's express credibility determinations. Insofar as those determinations are implicit, they also deserve due regard. The agency's reliance upon its own hearsay reports to find Ms. Hardee not credible after the ALJ ruled in her favor is beyond the scope of review judge's power. *Costanich*, 138 Wn. App. at 559.

(b) The Review Judge and the Court of Appeals Misread the DEL Regulation Regarding Unsupervised Access

The review judge also exceeded her authority when she re-wrote a critical DEL regulation. The applicable DEL regulation states that if the children are within sight *or* hearing of the child caregiver, they are not unsupervised. WAC 170-296-1360.[4] If DEL thinks this standard should be changed, it may do so through appropriate rulemaking. However the review judge is not allowed to change it *sua sponte* in an adjudicative hearing.

The review judge claimed that the requirement that Hardee could not leave children unsupervised with unauthorized persons meant that Hardee had to be within sight *and* hearing at all times. CP 257-58. The Court of Appeals upheld this error when it agreed with the review judge that the evidence showed that Hardee violated the regulation by being out of sight, without acknowledging the unchallenged ALJ finding that Hardee was never out of hearing. *Hardee*, 152 Wn. App. at 60.

The review judge committed a number of errors that exceeded her authority, and the superior court should have reversed the review judge's decision. She did not give due regard to the ALJ's opportunity to observe

[4] The WACs pertaining to DEL were re-codified in 2006 to reflect DEL's new independence from DSHS. However, the language of the regulation at issue did not change.

witnesses, making the ALJ's role irrelevant and violating the APA. *Costanich,* 138 Wn. App. at 555. She also reversed many critical factual findings based solely on hearsay in violation of the scope of her authority. *Kabbae*, 144 Wn. App. at 445. Finally, she erred in ignoring the critical regulation that applied to Hardee's conduct, holding Hardee to a higher standard than the law requires.

(c) If WAC 170-03-0620(1) Does Not Require a Review Judge to Give Due Regard to the Credibility Determinations of an ALJ, Then the Rule Violates the APA

Although *Costanich* was an abuse case, and the court acknowledged that DSHS had different deference rules for licensure abuse cases, *Costanich* never addressed whether a lower standard of deference in licensure cases might violate the APA. That question was not raised.

To the extent that DEL review standard here conflicts with the APA, it is invalid. *Edelman v. State ex rel. Public Disclosure Comm'n*, 116 Wn. App. 876, 882, 68 P.3d 296, *affirmed*, 152 Wn.2d 584, 99 P.3d 386 (2003). Because it is a state agency not exempted from the APA, the adjudicative procedures of the APA apply to DEL, and any rule promulgated by DEL may not exceed the agency's authority under the APA. RCW 34.05.570(2)(c).

The *Costanich* court observed that if the ALJ system is to have any meaning under the APA, some deference to the ALJ's factual findings is

critical: "If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be superfluous." *Costanich,* 138 Wn. App. at 555.

The Legislature wrote this deference principle into the APA in the form of RCW 34.05.464(4), which requires the review judge to give "due regard" to the ALJ's opportunity to observe witnesses.

When DEL adopted a deference standard for licensure cases in WAC 170-03-0620(1), it required that the review judge "consider" the ALJ's opportunity to observe the witnesses. However, the APA standard controls, and to the extent that the WAC applies a different standard, it is invalid. *Edelman,* 116 Wn. App. at 882.

Giving "due regard" to a finder of fact's unique opportunity to observe witnesses protects the integrity of the administrative review system. It is the sole province of the fact-finder to pass on the weight and credibility of evidence. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002) ("The hearing officer is in the best position to weigh the testimony and make findings as to its credibility."); *Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 652, 157 P.2d 298 (1945).

If WAC 170-03-0620(1) allows the review judge to ignore explicit or implicit credibility findings based on hearsay, it violates the APA.

(4) Petitioners Should Be Awarded Attorney Fees

Under RAP 18.1, a prevailing party may be awarded attorney fees when allowed by applicable law. Hardee has challenged an agency action, and is therefore entitled to attorney fees under the Equal Access to Justice Act:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). "Agency action" is defined as "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 4.84.340(3); RCW 34.05.010(3). "Qualified party" means:

> . . . a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed . . . .

RCW 4.84.340(5). Hardee is a qualified party under this definition.

Hardee should be awarded attorney fees incurred at each level of judicial review of this case.

F. CONCLUSION

Child care givers have as much at stake in the retention of their professional licenses as doctors and nursing assistants. They should be subject to this property deprivation only upon the showing of clear, cogent, and convincing evidence. Under either standard, the evidence in this case does not merit revocation. This Court should reverse the Superior Court and Court of Appeals, reinstate the ALJ's initial decision, and allow Hardee to return to her career. Hardee should be awarded her attorney fees and costs incurred in the judicial review of this case.

Dated this 9th day of April, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U. S. mail a true and accurate copy of the following document: Supplemental Brief of Petitioner in case number 83728-7 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 9, 2010, at Tukwila, Washington.

Christine Jones
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ORIGINAL